INDEX

		Page
I	Opinion Below	1
II	Jurisdiction	2
III	Introduction	2
IV	Statute Involved	3
V	Counter-Statement of Questions Presented	4
VI	Counter-Statement of the Case	6
VII	Summary of Argument	10
VIII	The Argument	14
IX	Conclusion	32

CASES CITED

Berman v. Parker (1954), 348 U.S. 26, 33 ..... 11, 18

Besig v. United States (1953), 208 F. 2d 142 13

Bread v. Alexandria (1951), 341 U.S. 622, 642 ..... 11, 18, 19

Burstyn v. Wilson (1952), 343 U.S. 495 ..... 2, 12, 22, 25

Commonwealth v. Gordon, 66 Pa. D. & C. 101; affirmed sub. nom.
Commonwealth v. Feigenbaum, 166 Pa. Super. 120; 70 A. 2d 389 27

Connolly v. General Construction Co. (1926), 269 U.S. 385 23

Daybrite Lighting Co. v. Missouri (1952), 342 U.S. 421 ..... 11, 18, 19, 20

Dennis v. United States (1951), 341 U.S. 494, 515 23

Doubleday & Co., Inc. v. New York, 335 U.S. 848 30

Dunlop v. U.S., 165 U.S. 486 28

BRIEF ON MERITS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 16

ALFRED E. BUTLER,

Appellant

v.

STATE OF MICHIGAN

Appeal from the Recorder's Court of the City of Detroit, State of Michigan

---

BRIEF FOR APPELLEE

I

Opinion Below

The opinion of the trial judge may be found in the printed transcript of record at pp. 230 to 232.[*]

---

[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

II

Jurisdiction

It is readily conceded that questions sought to be reviewed were raised in the court below (R. 3), that they were duly presented to the State's highest court in a timely application for leave to appeal (R. 240), that such application was denied (R. 295) without opinion, that the recorder's court of the city of Detroit thereupon became the court of last resort from which appeal to this Court could be taken, that appellant's notice of appeal (R. 236) was timely filed, and that this Court noted probable jurisdiction (R. 296). We do not agree, however, that cases cited in counsel's jurisdictional statement, brief, p. 2, are controlling. We think they may be distinguished. *Winters v. New York* (1947), 333 U.S. 507; *Burstyn v. Wilson* (1952), 343 U.S. 495; *Holmby Productions, Inc. et al., v. Vaughan et al.*, 350 U.S. 870.

III

Introduction

We are not in accord nor can we accept the appraisal of the book here in question found in counsel's "Introduction," brief, pp. 2-5, for it is our position that while THE DEVIL RIDES OUTSIDE possibly possesses some degree of literary merit, entitling it to a place on the "closed shelf" of a public library when first published in a hard-cover edition, it is dominantly obscene as published in a low-priced, paper-cover edition, prominently displayed in drug stores and other places frequented by adolescents.

IV

Statute Involved

There is drawn in question the constitutional validity of a section of Michigan law which in substance though in slightly varying phraseology appeared in the Revised Statutes of 1838, [1] was reenacted in the Revised Statutes of 1846,[1a] continued in successive compilations for more than 80 years,[2] was embodied in the penal code of 1931 and amended in 1953.[3] Only on 3 occasions has the Michigan Supreme Court construed or applied the act.[4]

Section 343 of Michigan's penal code, as amended, so far as here applicable and as it stood when appellant sold the book in question (June 16, 1954), provides:

---

[1]

Mich. Rev. Stat. 1838, Part 4th, Title 1, Chap. 8, § 10, page 647, official edition. This section probably derived from an earlier act of the governor and judges or the legislative council of the Territory of Michigan.

[1a]

Mich. Rev. Stat. of 1846, Title XXX, Chap. 158, § 13, p. 682, official edition.

[2]

Comp. Laws Mich., 1857, § 5868, 1871, § 7703, Howell's Stat., § 9289, Comp. Laws 1897, § 11700, 1915, § 15474, and 1929, § 16829.

[3]

Penal Code, Pub. Acts 1931, No. 328, § 343, as amended by Pub. Acts 1953, No. 74, effective Oct. 2 [Comp. Laws Supp. 1948, § 750. 343 (Mich. Stat. Ann.—Henderson—1954 Rev. § 28.575)].

[4]

People v. Girardin, 1 Mich. 90; People v. Ketchum, 103 Mich. 443; and People v. Lathers, 223 Mich. 92.

"Sec. 343. Any person who shall . . . sell . . . any book . . . containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious . . . descriptions, [tending to incite minors to violent or depraved or immoral acts,] manifestly tending to the corruption of the morals of youth, . . . shall be guilty of a misdemeanor."[5]

It should be noted in passing that this section of Michigan's Penal Code does not include those provisions of Michigan law cited by Mr. Justice Frankfurter in his dissenting opinion in *Winters v. New York* (1947), 333 U.S. at 522, as among statutes which fell by force of that decision.[5a]

V

Counter-Statement of Questions Presented

Laying aside as irrelevant, any "marginal case" which might arise in the future, and applying the statute involved strictly and exclusively to facts and circumstances disclosed by the record in this cause,

---

[5]

The bracketed phrase ["tending to incite minors to violent or depraved or immoral acts,"] was added by amendment, Pub. Acts Mich. 1953, No. 74, effective October 2.—A misdemeanor is punishable by maximum imprisonment for 90 days or a fine of $100 or both. Penal Code, § 504 [Comp. Laws 1948 Supp., § 750.504 (Stat. Ann. 1954 Rev. § 28.772)].

[5a]

Mich. Penal Code, § 344 [CL 1948, § 750.344 (Stat. Ann. 1954 Rev. § 28.576)] provides: "Any person who sells . . . any book . . . devoted to the publication or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime shall be guilty of a misdemeanor."

(1) may not the State of Michigan, in a legislative enactment applied in this case to a low-priced, paper-bound book prominently displayed for sale in drug stores and other places frequented by adolescent school children, and in exercise of inherent police power, proscribe the sale and distribution of a book containing descriptions of sex acts, so obscene as to tend "to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of youth";

(2) also bearing in mind the commonly-accepted meaning as well as judicial definitions of the term "obscene," which include the element or factor of "corruption of morals," is the language of § 343 of the Michigan Penal Code so vague and indefinite as to offend the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; and

(3) does § 343 of Michigan's Penal Code as here applied and properly construed, deprive appellant of any rights under the First Amendment and the Due Process Clause of the Fourteenth, because it prohibits the sale of a book "containing" obscene descriptions tending to corrupt the morals of youth.

VI

Counter-Statement of the Case

In addition to those so fairly set forth in appellant's statement, a few other facts and circumstances are deemed essential to a clear understanding of the questions presented:

1. When the case was called in open court (R. 5), the trial judge immediately noted that since no request for jury trial was in the file, he took it that no right was being taken from the accused in proceeding without a jury. Counsel for appellant then stated he wished to proceed without a jury, and the trial went forward.[6]

2. The arresting officer testified (R. 17) that while in charge of what is known as the "censorship bureau" of the Detroit police department in 1954, a book entitled "The Devil Rides Outside," written by John H. Griffin and published by Pocket Books, Inc., had been brought to his attention by the Ludington News Company, local distributor of "Pocket Books" in Detroit. The court, however, cut off this line of inquiry by sustaining an objection of defense counsel to a question whether this book had been submitted to the witness for approval before it was placed on sale, on the ground that the offense charged was the sale of the book. And the judge likewise sustained a similar objection (R. 18) to further questions which might draw out the fact

---

[6]

Under Michigan law the constitutional right to trial by jury in a misdemeanor case tried by a justice of the peace, may be waived. Code of Criminal Procedure, Chap. 3, § 3 [Comp. Laws 1948, § 763.3 (Mich. Stat. Ann. 1954 Rev. § 28.856)]. People v. Henderson, 246 Mich. 481.

that when the book came to his attention the officer consulted with the prosecuting attorney and placed the book upon the prohibited list.[7]

3. It is also permissible to note that during his argument of appellant's motion to dismiss, defense counsel agreed (R. 10) that if the ruling on such motion should be in his favor, the paper book in question would appear in drug stores and book stores, and so forth, for sale, freely accessible throughout the entire community.

On this subject, the executive vice-president of Pocket Books, Inc., publisher of this book (R. 42) testified (R. 46) that his company does no advertising on books but "puts them through racks which you've seen in drug stores, cigar stores, that is all." Approximately 50% of its outlets are drug stores while the rest would be made up of five and ten-cent stores, department stores, cigar stores and news-stands (R. 49). In the drug stores they are displayed. If a book such as this is permitted to go out through the company's usual channel of sale and distribution, it would ultimately appear in the drug stores and in the dime stores, of the city

---

[7]

It should be noted at once that Michigan has no censorship law placing prior restraints upon the publication or sale of books. Law and Contemporary Problems, Vol. XX, p. 648, "The Doctrine of Prior Restraint," by Thomas I. Emerson, Yale University.—The "censorship bureau" to which Inspector Case refers, is conducted by the Detroit police department under a wholly voluntary arrangement with book distributors in cooperation with the prosecuting attorney upon whose advisory opinions all rely in their determination to protect youth from the evil effects of obscene literature. Please see law review article, "Literature, the Law of Obscenity, and the Constitution," Minnesota Law Review, Vol. 38, p. 295 at p. 314, for a description of the Detroit plan. There is, however, no statutory authority for such a system and it is wholly extra-legal. Our position is that it is not presently involved.

of Detroit and state of Michigan. It is a fact that some of these drug stores and other places mentioned, sell school supplies and some of these stores are located near schools. They are prominently displayed "in places where schools are right near (R. 50)."

Moreover, this witness admitted in response to a question from the bench (R. 50) that covers are placed on such books with the idea in mind that "if you can make it look good, somebody will probably buy the book." And he further testified (R. 50):

> "We attempt to make the cover as honest a representation as we can of the contents inside the book, and to have a copy when the space is available, also carry out that theme and have it an attractive package for eye-appeal as we do within the bounds of good taste."

Corroborative testimony to this effect (R. 165-168) was also adduced from the executive secretary of the Detroit Retail Druggists Association.

4. When the arresting officer testified (R. 19) that he had taken 101 excerpts from the book, upon which he based his request for a warrant (R. 21), such passages were offered and received in evidence (R. 21-23) as People's Exhibit 2 (R. 252-295) over counsel's objection based on the doctrine that the book must be viewed as a whole and that any other view, permitting it to be judged by excerpts, would violate the prevailing rule in obscenity cases.[8] The court ruled (R. 23) as follows:

---

[8]

This brings into focus the conflict between the Hicklin rule of Lord Cockburn, Regina v. Hicklin, L.R., 3 Q.B. 360 and the so-called "modern rule" first applied in United States v. One Book, Ulysses, 72 F. 2d 709.

". . . I have not read the complete book. I intend to. Now, whether I base my decision on the complete book afterwards or the excerpts contained in there will be a matter for my opinion there (then). So, without passing on that matter now, I am going to permit the excerpts in evidence, merely to facilitate the questioning, identification, rather than having the book brought in and marked and then remarked, and so forth. In other words, to expedite the handling of the trial."

5. We feel that counsel's summary, brief, pp. 22-23, of the testimony of Professor Hollis (R. 212-228), a witness for the State, should be supplemented as follows:

Asked by the prosecutor (R. 216) whether those excerpts from the book appearing in People's Exhibit 2, detracted from its literary merit, the witness replied it was not the material in such passages which did so, but the way in which they were treated. Prompted by leading questions from the bench, he replied he meant it is the author's method of handling such passages, rather than the incidents, his minute descriptive detail of sensual feelings of the sex act; the author could have said the same thing in another way without making the book offensive at all. In other words, it was important to the theme of the novel, as the witness saw it, that the temptations of the flesh be understood from the point of view of the reader. Description of temptations of the flesh as presented here was not seen by the witness as an item in the conflict presented as a theme of the novel, but rather as a separate "spirit" (spur?) to the sexual appetite of the reader, rather than it should have been, connected with the theme of the novel.

On cross-examination (R. 217), judging the work as a whole, Professor Hollis did not find a sincerity of purpose. The conflict was not made sufficiently apparent to him

(R. 218); the conflict between the spiritual against the flesh was not, to him, convincing. The sex act in itself in normal circumstances is a healthy thing; here, it is made a morbid thing. The man's attraction to sexual acts in isolated passages of the book. While he might say that might be in a facet of human life, he did not think the author universalized it to him in a sense "that he's made it convincing to him as a normal person, representative person's reaction to the problems of life, problems of conquering one's appetites, and so on." The witness likened the book (R. 221) to Daniel DeFoe's "Moll Flanders," which he stated was written for the market and had sex passages inserted to permit the reader to vicariously enjoy things he could not enjoy in life (R. 251).

6. Finally, it is our interpretation of the decision of the trial judge (R. 230-232), that while he held the appellant guilty (R. 232) because he sold a book containing language set forth in the excerpts, he also found "that even viewing the book as a whole, it was not necessary to the proper development of the theme nor the conflict expressed therein."

VII

Summary of Argument

In considering the constitutional questions presented by appellant, the statute involved should, if fairly possible, be construed to avoid any doubt of its validity.[9] Section 343 of the Michigan Penal Code is to be viewed only as applied in this particular case to a low-priced, paper-bound edition of a book "containing" obscene descriptions, prominently

---

[9]

Panama R. Co. v. Johnson (1924), 264 U.S. 375, 390; Everson v. Board of Education (1947), 330 U.S. 1, 6, 7; Salsburg v. Maryland (1954), 346 U.S. 545, 553; United States v. Harriss (1954), 347 U.S. 612, 618.

displayed for sale in drug stores and other places frequented by adolescent school children (R. 10, 46, 49, 50); and one should disregard any hypothetical, marginal or borderline case that could be put where doubts might arise;[10] nor is the Court concerned with a licensing act imposing prior restraint upon the sale of books, or authorizing censorship by some administrative agency.[11] Reasonably interpreted within its current setting in the case at bar, the Michigan enactment proscribing the sale of such books does no violence to the Free Press Clause of the First Amendment or Due Process Clause of the Fourteenth Amendment.

1. Since the police power of a State is sufficiently broad to cover and safeguard the peace, health, safety, morals and welfare of the people, the Michigan legislature violated no constitutional principles in prohibiting acts thought to bring evil to the public through the sale of books "containing" obscene descriptions tending to corrupt the morals of youth.[12] One closes his eyes to reality when he

---

[10]

United States v. Petrillo (1947), 332 U.S. 1, 7; United States v. Harriss (1954), 347 U.S. 612, 618.

[11]

Counsel for the Metropolitan Detroit Branch of the American Civil Liberties League, appearing amicus curiae, is mistaken in his thought that this is a censorship case and he relies upon numerous newspaper articles and law review comments which appellee is not permitted to meet by cross-examination or competent proof. Moreover, appellant's counsel cut off such an inquiry when in the trial court he objected to such testimony and was sustained (R. 18).

[12]

The broad reach of police power reserved to the States and expressly delegated to the Congress, has been recognized by this Court in recent decisions. Kovacs v. Cooper (1949), 336 U.S. 77, 83; Breard v. Alexandria (1951), 341 U.S. 622, 642; Daybrite Lighting Co. v. Missouri (1952), 342 U.S. 421; and Berman v. Parker (1954), 348 U.S. 26, 33.

intimates that such corrupting influences exerted upon adolescents does not affect the public health, safety, morals or general welfare of all citizens. Moreover, there was proof at the trial (10, 46, 49, 50) indicating the probable audience of this particular book and it is fairly to be inferred from competent testimony that it was to be specifically directed to young readers. We respectfully submit the measures adopted by the legislature in 1838 and since retained in the body of Michigan law, are not arbitrary and oppressive.[13]

2. The Michigan statute uses the word "obscene" in its commonly-accepted sense and does not by connected phrases ["tending to the corruption of the morals of youth"] establish vague or indefinite standards of conduct. The opinion of this Court in *Winters v. New York* (1947), 333 U.S. 507, 511, 520, as explained in *Kovacs v. Cooper* (1949), 336 U.S. 77, 80, draws its own distinctions,[14] while in other cases cited on pp. 36-37 of counsel's brief,[15] the Court struck down legislative acts because they established systems of administrative censorship and sanctioned "previous re-

---

[13]

The conflict between the Hicklin Rule (Regina v. Hicklin, L.R., 3 Q.B. 360) and the "Modern Rule" advocated in United States v. Ulysses (1933, 1934), 72 F. 2d 705, 707-708), will be discussed under our third point.

[14]

In Kovacs, after distinguishing the section of the N.Y. penal code condemned in Winters from the following section which dealt with obscenity, Mr. Justice Reed said: "Neither the States nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise."

[15]

Burstyn v. Wilson (1952), 343 U.S. 495, followed without opinion, or per curiam in Superior Films v. Dept. of Education (1954), 346 U.S. 587 (concurring opinion by Mr. Justice Douglas), and Holmby Productions, Inc. v. Vaughan (1955), 350 U.S. 870.

straints," not because they contained vague or indefinite terms.

3. Meeting appellant's point "D," brief, pp. 38-41, that "because it prohibits the distribution of a book 'containing' *any* obscenity, the Michigan statute violates the constitutional guarantees of freedom of press and due process of law," it is our position: (a) that the Michigan law when reasonably construed, does not obviate application of the "book-as-a-whole" rule announced in *United States v. Ulysses,* 72 F. 2d 705; (b) that doubt is cast upon applicability of such a rule as a constitutional test to determine whether Michigan, in exertion of her police power, may by this statute protect her youth from the corrupting influence of books which are obscene in part, as well as citizens of the State from the evil effects thereof; indeed it might be said that Michigan would violate no constitutional principle should she choose to retain what some critics regard as an outmoded rule of the much-condemned Victorian standards of decency;[16] (c) even though the rule in *Ulysses* must be applied, it clearly appears that the book in question, as distributed in a cheap, paper cover edition, with suggestive "blurbs" and pictures, through drug store outlets frequented by school children of adolescent and inquiring minds, is dominantly obscene; (d) while the court below may have laid emphasis upon excerpts from the book (People's Exhibit 2, R. 252-294), nevertheless it clearly appears from the entire record that the trial judge gave due consideration to the "book-as-a-whole," finding it to be such; and (e) if the court erred in failing to apply the

---

[16]

Judge Stephens of the 9th Circuit has well said: "The civilization of our times holds to the premise that dirt in stark nakedness is not generally and at all times acceptable. And the great mass of the people still believe there is such a thing as decency." Besig v. United States (1953), 208 F. 2d 142.

Ulysses rule as a *factual* test, a point we do not concede, this Court, without invalidating the statute itself and dealing it a death blow, could order a new trial with instructions to view the book "as a whole" and decide whether it is dominantly obscene as here applied.

VIII

The Argument

Preliminary Considerations:

1. Since the statute here assailed on constitutional grounds, has been retained by the Michigan legislature for at least 118 years,[17] and has gone unchallenged for over a century, it comes into this Court with strong presumptions favoring its validity, to be construed, if fairly possible, to avoid any doubt of its constitutionality, and without regard for any marginal case that could be put where doubts might arise,

Panama Railroad v. Johnson (1924), 264 U.S. 375, 390;

Everson v. Board of Education (1947), 330 U.S. 1, 6-7;

Salsburg v. Maryland (1954), 346 U.S. 545, 553;

United States v. Harriss (1954), 347 U.S. 612, 618; citing, *United States v. Petrillo* (1947), 332 U.S. 1, 7.

---

[17] Legislative intent to retain § 343 of Michigan's Penal Code as an expression of the conscience of the people of that State, was manifested when the section was recently amended by Pub. Acts 1953, No. 74 by adding the clause "tending to incite minors to violent or depraved or immoral acts."

2. The Court is therefore invited to lay aside the thought of any book which in the future may be condemned by a Michigan court because it contains a word, a phrase, a paragraph or a chapter of obscene import, unrelated to the main theme of the novel, for such is not the situation in the case at bar. Nor should the Court consider the lengthy list of books found in the brief of *amicus curiae*,[18] and said by its counsel to have been declared offensive by the Detroit police censorship bureau.

a. The court below, in sustaining an objection raised by counsel for appellant (R. 17, 18), refused to consider any prohibited list of books prepared by the witness Inspector Case.[19] And the trial judge was meticulous in enforcing his ruling throughout the proceedings which led to appellant's conviction.

b. Although counsel for appellant, who on behalf of his client had control of this litigation so far as his interests are concerned, shut out all reference to the Detroit censorship system (R. 17, 18), and made no direct claim that the

---

[18]
Memorandum for Metropolitan Detroit Branch, American Civil Liberties Union, Amicus Curiae.

[19]
The witness Inspector Case was asked by the prosecutor (R. 17) whether the book had been submitted to him before it was placed on sale; counsel for appellant immediately interposed his objection and was sustained when the court below said: "The offense charged here is . . the sale of the book. Let's get right down to whether he bought a book or whether he didn't, from this defendant." When the witness was asked whether he had consulted with the prosecuting attorney and placed the book on the prohibited list, defense counsel renewed his objection (R. 18). The court ruled: "I don't care whose list it was placed on. The question is, did he buy it, is it obscene. . . . I can't be controlled by any one's list. I have to make up my mind."

Michigan statute placed "previous restraint" upon the sale or distribution of books claimed to be obscene, yet despite this fact of record, counsel for *amicus curiae, supra* (note 18), throughout his memorandum overstresses this point, insisting that the Detroit police censorship bureau operates to place prior restraints upon the sale of books which it has condemned as obscene, and he has, after apparent painstaking research, compiled references to newspaper articles, legal publications, law reviews, and congressional committee proceedings, all of which, we respectfully submit, are irrelevant to a review of the record of the court below.[20]

1

Reasonably interpreted within its current setting in the case at bar, the Michigan statute does no violence to the Free Press Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.

On page 28 of his brief, counsel for appellant states that "the Michigan statute here in question is a criminal statute and as such must be strictly construed." Such is not the rule in Michigan. The Penal Code of that State, Chap. 1, § 2 [Comp. Laws 1948, § 750.2 (Stat. Ann. § 28.192)] expressly provides that "the rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed accord-

---

[20]

It will be found, we think, that many of such law review articles were written by special pleaders strongly opposed to the "Detroit Plan." See, esp., law review article entitled "Literature, the Law of Obscenity, and the Constitution," Minnesota Law Review, Vol. 38, p. 295 at p. 314. While we hold no brief for this plan in the case at bar, we have been informed that the system is wholly voluntary and that it is joined by book distributors in the city of Detroit on that basis.

ing to the fair import of their terms, to promote justice and to effect the objects of the law."

It is of course true, as stated by counsel, that the constitutional validity of the act has not been passed upon by the State's highest court, and that the Supreme Court denied appellant's application for leave to appeal, although the prosecuting attorney suggested it be granted because, in his opinion, a clarification of the language of the statute was necessary (R. 397). We cannot agree, however, that this is of any significance. The Supreme Court exercised its discretion in denying leave to appeal, without opinion, and was not bound to adopt the prosecutor's suggestion.[21] Nor does it follow that the Supreme Court of Michigan adopted the construction given the statute by the court below. And we do not agree with counsel's version of the ruling of the trial judge.[22] Nor are we in accord with counsel's contention "that this Michigan statute, on its face and as applied, involves very manifest infringements of his (appellant's) constitutional rights of freedom of press and due process of law," or that for this reason the judgment of the court below should be reversed.

---

[21]

Although we cannot speak for the Michigan Supreme Court, it may well be that the judicial conscience was so inexpressibly shocked by the dominant indecency of the book that they rejected the application for leave to appeal on that ground. In any event, it was an exercise of judicial discretion.

[22]

This point will be discussed under another head.

A. Since the police power of a State is sufficiently broad to cover and safeguard the peace, health, safety, morals and welfare of the people, the Michigan statute violates no constitutional principles in prohibiting acts thought to bring evil to the public through the sale of books containing obscene descriptions tending to corrupt the morals of youth.[23]

The long reach of broad police power reserved to the States by the 10th Amendment, or expressly delegated to the Congress to be exercised within federal fields of regulation or proscription, has been recognized by this Court in comparatively recent decisions,

Kovacs v. Cooper (1949), 336 U.S. 77, 83;

Breard v. Alexandria (1951), 341 U.S. 622, 642;

Daybrite Lighting Co. v. Missouri (1952), 342 U.S. 421;

Berman v. Parker (1954), 348 U.S. 26, 33.

Thus, in *Kovacs, supra,* 336 U.S. at p. 83, Mr. Justice Reed, announcing the judgment of the Court and an opinion in which the Chief Justice and Mr. Justice Burton joined, had this to say:

> "The police power of a State extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people."

---

[23] This phase of the question is discussed in appellant's Brief as counsel's point "B," pp. 32-35.

The same Justice, speaking for the Court in *Breard, supra,* 341 U.S. at 642, said:

> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

So, too, it has been said, this Court's recent decisions make plain that the Court does not "sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." State legislatures "have constitutional authority to experiment with new techniques; they are entitled to their own standards of the public welfare." Mr. Justice Douglas in *Daybrite, supra,* 342 U.S. at 423.

Appellant's argument runs something like this: (1) he complains, brief, p. 32, that the Michigan statute by its terms "lowers the permissible standard of adult reading to a child's level"; counsel asserts that the case at bar "did not deal with any actual or specifically intended distribution of the book to any minor," nor was there proof at the trial, brief, p. 33, "indicating the probable audience of this book or that it was specially directed to young readers." (2) Conceding that the police power of a State "encompasses the protection of the morals of youth," appellant argues that the Michigan statute employs "excessive means to combat the evil; legislation which arbitrarily and oppressively infringes on the appellant's freedom of press." And, he argues, brief, p. 35, that "in the protection of the interests of those who might be *abnormally susceptible,*" the court below was necessarily required to eliminate the

interests of those "who might have profited from the work." Finally, (4) counsel contends that the rule of the *Hicklin* case (*Queen v. Hicklin* [1868], L.R. 3 Q.B. 360, 371) can never comport with requirement of freedom of the press, "because it operates as a restricted license to publish and distribute only those works which might have no ill effects upon the young."

1. As stated in our summary of the argument, one closes his eyes to reality when he intimates, as does counsel, that the corrupting influence of an obscene book exerted upon adolescents does not affect the public health, safety, morals or general welfare of *all* citizens within the state. To expand this statement would tend merely to uphold the wisdom of the legislation, with which courts have no concern, *Daybrite Lighting Co. v. Missouri* (1952), 342 U.S. 421, 423.

And, as pointed out in our summary, indeed throughout this brief, there *was* proof at the trial (R. 10, 46, 49, 50) indicating the probable audience of THE DEVIL RIDES OUTSIDE, and that it was to be specifically directed to young readers. Suffice it to note that the Court is not presently troubled by a book as published in hard-cover and distributed through a book-of-the-month club, or through regular channels of the trade at prices ranging from $3.00 to $4.00 or higher. Such books, although containing obscene descriptions, and this seems to be the "enlightened" trend of the modern novel, are not ordinarily purchased by school children with moderate "allowances," and, as we have seen, this particular piece of literature was placed on the restricted shelf of the Detroit Public Library beyond reach of those who, because of their youth and adolescent curiosity, might be intrigued by its contents.

On the contrary, THE DEVIL RIDES OUTSIDE was published by a firm engaged in distribution of such litera-

ture in pocket-size, paper-covered books, designed, as the proofs show, for sale at a low price to school children who frequent drug stores and other places where they are distributed.

We respectfully submit that to forbid the sale of such books as may contain obscene descriptions tending to corrupt the morals of youth, is well within the police power of the States.

2. Nor does this statute, as here applied, employ constitutionally excessive or arbitrary means to combat the evil sought to be curbed. In our view, evil which tends to corrupt the morals of youth, may be checked by any reasonable legislative measures, while the question of means lies wholly within the discretion of the lawmakers.

Of course, as this Court noted in cases cited in appellant's brief, p. 33,

> *Treigle v. Acme Homestead Association* (1936), 297 U.S. 189, 197;
>
> *Liggett Co. v. Baldridge* (1928), 278 U.S. 105, 111-112,

though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end "which is in fact public and the means adopted must be reasonably adapted to that end and must not be arbitrary and oppressive" (*Treigle, supra,* Headnote 7).

In the case of *Liggett, supra,* the Court struck down as invalid, a state statute forbidding any corporation to own a pharmacy or drug store in addition to those owned at the time of the enactment, unless all of its stockholders were

licensed pharmacists, as applied to a foreign corporation which owned such stores under license of the State, and sought to extend its business by acquiring and operating others. The Court said among other things, id., p. 113:

> "A state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

We respectfully submit that the Michigan statute prohibiting distribution of books containing obscene descriptions "tending to the corruption of the morals of youth," is an exercise of the police power for an end which is in fact public, rather than private, and that reasons may be assigned for the exertion of that broad power.

B. The Michigan statute uses the word "obscene" in its commonly-accepted sense does not by connected phrases [e.g., "tending to the corruption of the morals of youth"] establish vague or indefinite standards of conduct.

Contending that the Michigan statute defines obscenity in vague and indefinite terms and that hence its restrictions on the sale of obscene literature do not comport with due process, brief, pp. 35-38, counsel cites in support of his position,

Winters v. New York (1947), 333 U.S. 507;

Burstyn v. Wilson (1952), 343 U.S. 495;

Gelling v. Texas (1952), 343 U.S. 960;

Superior Films, Inc. v. Department of Education (1954), 346 U.S. 587;

Holmby Productions, Inc. v. Vaughan (1955), 350 U.S. 870.

1. The general rule, of course, is that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential to due process of law.[24]

Mr. Justice Holmes, however, in *United States v. Wurzbach* (1930), 280 U.S. 396, 399, said:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Thus it follows that though there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls, this is not sufficient reason to hold the language too ambiguous to define a criminal offense,

Mr. Justice Black for the Court in

United States v. Petrillo (1947), 332 U.S. 1, 7.

It was also held in *Petrillo, supra,* that impossible standards of specificity are not required, a principle recognized by Mr. Chief Justice Vinson in later decisions,

Jordan v. De George (1951), 341 U.S. 223, 231;

Dennis v. United States (1951), 341 U.S. 494, 515.

---

[24] The general rule is well stated in Connolly v. General Construction Co. (1926), 269 U.S. 385.

2. The decision of this Court in *Winters, supra,* invalidated subsection 2 of § 1141 of the New York Penal Law, as construed by the State Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person, holding it so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

As later explained in *Kovacs v. Cooper* (1949), 336 U.S. 77, 79-80, by the same justice who wrote for the Court in *Winters,* he had pointed out in the opinion that prosecutions might be brought under statutes punishing the distribution of "obscene, lewd, lascivious, filthy, indecent or disgusting" magazines. The Court had said in *Winters,* p. 518:

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court."

And on page 520:

"To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by principles of the First Amendment, by the use of apt words to describe the prohibited publications. Section 1141, subsection 1, quoted in note 2, is an example. Neither

the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise."

The other cases cited in appellant's brief, have little, if any bearing on this problem. Since the "chief purpose" of the constitutional guaranty of liberty of the press is "to prevent previous restraints upon publication," *Near v. Minnesota,* 283 U.S. 697, 713, and inasmuch as Michigan's legislative proscription of the obscene does not establish censorship, counsel's position is not sustained by *Burstyn, Gelling, Superior Films,* or *Holcomb Productions, supra.*

Burstyn v. Wilson, supra, 343 U.S. 495, condemns provisions of the New York Education Act which forbid the commercial showing of any motion picture film without a license and authorize denial of a license on a censor's conclusion that a film is "sacrilegious," as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the States by the Fourteenth Amendment. *Gelling v. Texas, supra,* 346 U.S. 960, merely followed *Burstyn* and *Winters,* with a concurring opinion by Mr. Justice Frankfurter that in his view the ordinance in question lacked definiteness, and a concurring opinion by Mr. Justice Douglas condemning the evil of prior restraint through censorship. Likewise, *Superior Films, supra,* 346 U.S. 587, merely reversed judgments of Ohio and New York without opinion, on the strength of Burstyn, while Mr. Justice Douglas and Mr. Justice Black, concurring, once again cited *Near v. Minnesota, supra,* 283 U.S. 697, in condemning censorship. And the Court reversed the judgment in *Holcomb Productions, supra,* 350 U.S. 870, on like authority. Obviously, since the Michigan legislature has not set up censorship over the sale of books, these decisions are inapplicable.

3. Had the Michigan statute prohibited the sale of any book "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth," and prescribed punishment therefor, we might be in trouble. When, however, these words are coupled with such phrases as "obscene, immoral, lewd or lascivious . . . descriptions," they take on a clear and definite meaning. Any truly obscene descriptions, such as we find in the book before the Court, would irrevocably tend to corrupt the morals of youth. We respectfully submit that the language of this statute is sufficiently clear, definite and certain to meet the constitutional requirement of specificity and that it should not be struck down as invalid.

C. The Michigan statute does not violate constitutional guarantees of freedom of press and due process of law, because it prohibits distribution or sale of a book "containing" obscenity.

Counsel urge that § 343 of the Michigan Penal Code by use of the word "containing" obviates a fair consideration of the work as a whole, or the dominant purpose of the publication, thus impinging on the guaranteed constitutional freedom of press. And it is said that "at present, most federal and state courts in which the question has been considered, have explicitly adopted the requirement that a book must be judged as a whole, not by its parts taken out of context," citing:

United States v. One Book-Ulysses, 2 Cir., 72 F 2d 705;

United States v. Levine, 2d Cir., 83 F. 2d 156;

Parmalee v. United States, D.C. Cir., 113 F. 2d 729;

Walker v. Popenoe, D.C. Cir., 149 F. 2d 511;

Halsey v. N.Y. Society, 234 N.Y. 1, 4;

Commonwealth v. Gordon, 66 Pa. D. & C. 101; affirmed sub. nom. *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120; 70 A. 2d 389;

State v. Lerner (Ohio C.P. 1948), 81 N.E. 2d 282;

New American Library of World Literature v. Allen, N.D. Ohio, 114 F. Supp. 823.

a. Section 343 of the Michigan Penal Code among other things proscribes the sale of "any book . . . *containing* obscene descriptions . . . manifestly tending to the corruption of the morals of youth," and it is upon the word "containing" that appellant's counsel lay stress. It is noteworthy, however, that the section does not read "containing *any* obscene . . . descriptions" and as we view it, if the *Ulysses* rule is applicable, the book in question here may be judged as a whole, or its dominant effect may be considered. It is on this ground, we think, that the Ohio cases cited in appellant's statement may be distinguished from the case at bar and one from the other.

Thus in *State v. Lerner, supra*, (Ohio C.P. 1948), 81 N.E. 2d 282, Judge Struble considered and struck down as unconstitutional § 13035 G.C.O., as amended, which penalized the sale etc. of an obscene book, magazine, etc., "*not wholly obscene* but containing lewd or lascivious articles, advertisements" etc. But in *New American Library of World Literature v. Allen*, 114 F. Supp. 823, the court held that a city ordinance prohibiting sale or distribution of any book etc. "of *any* obscene or immoral nature" might be read as proscribing books of "*an*" obscene or immoral nature, and as thus read, the ordinance might be construed in harmony with the modern test of obscenity as not proscribing books that merely contain "*some*" obscenity. Thus construed, the validity of the ordinance was upheld as

against the contention that it violated freedom of the press[25]

b. It is significant, however, that the "modern rule" had its genesis in *United States v. One Book-Ulysses, supra,* not as a test of constitutionality under the First and 14th Amendments, but rather as a rule of statutory construction or as a test to determine as a matter of fact in a given set of facts and circumstances whether a designated book was "obscene." Thus, in *Ulysses* it was stated at the outset of Judge Augustus Hand's opinion that the appeal "raises sharply the question of the proper interpretation of section 305 (a) of the Tariff Act of 1930 (19 USCA § 1305-a)." And he concluded that the book as a whole did not fall within the statute. Judge Manton, who for all his subsequent faults, was a good lawyer and sound judge, vigorously dissented.[26]

No statute was declared infirm by the second circuit in *United States v. Levine,* 83 F. 2d 156, but there the charge of the trial judge led to error in construing and applying the postal laws. The instruction deemed erroneous was to the effect that in a prosecution for sending obscene advertisements through the mails, the statute was to protect the young and immature and ignorant and those who were sensually inclined and that the jury should regard the effect of books on their minds rather than on mature and highly intelligent people, and that the statute condemned a

---

[25]

What was condemned in this case and duly restrained by injunction was a censorship conducted by a chief of police without, however, imposing any restraint upon his power to enforce the ordinance by arrest and prosecution.

[26]

Citing: Rosen v. U.S., 161 U.S. 29; Dunlop v. U.S., 165 U.S. 486; U.S. v. Dennett, 39 F. 2d 564 and others.

book which contained a single passage which would excite lustful or sensual desires. While the court deemed this instruction reversible, Judge Learned Hand added, p. 157, that "our reversal does not mean that on another trial the proper standard can under no circumstances refer to adolescents," stressing the distinction between a sale to a youth and a general sale.[27]

In *Parmalee v. United States,* D.C. Cir., 113 F. 2d 729, another prior restraint upon publication was involved, libel, confiscation and destruction of an obscene book so alleged under the Tariff Law of the United States. The court repudiated the Hicklin Rule, Mr. Associate Justice Vinson dissenting in a well-reasoned opinion, 113 F. 2d at 738.

An order of a postmaster barring plaintiff's pamphlet from the mails *without a hearing* was deemed a violation of due process in *Walker v. Popenoe,* D.C. Cir., 149 F. 2d 334.

Section 1141 of the New York Penal Law provides that a person who sells any obscene, lascivious, indecent or disgusting book is guilty of a misdemeanor. The defendant in *Halsey v. New York Society,* 234 N.Y. 1, by complaint lodged with a magistrate caused the arrest and prosecution of the plaintiff for selling such a book and the latter was acquitted. He brought suit for malicious prosecution. The court of appeals held, *inter alia,* that in such an action

> "whether a book, the work of a great author, written in admirable style, which has become a part of classical literature and which has been widely sold but which

---

[27] At bar, while the sale was in a sense "general," 50% of the books were sold in drug stores where school children congregate and where school supplies are sold.

> contains many indecent paragraphs, is of such a character as to justify the reasonable belief that its sale was a violation of section 1141 of the Penal Law, is a question for and properly submitted to the jury in an action for malicious prosecution. . . . "

Certain it is that in *Halsey*, the New York statute was not deemed unconstitutional.

While it is true that constitutional considerations governed state courts in the Pennsylvania and Ohio cases cited by appellant, his counsel, unless we are much mistaken, has failed to point to a Federal decision striking down a State law on the ground that its provisions obviated application of the so-called "modern rule." The closest approach to consideration of such a question was *Doubleday & Co., Inc. v. New York,* 335 U.S. 848, affirming by equally divided vote, and without opinion, a conviction under Section 1141 of the New York Penal Law. In fact, no opinions were written by any court, except for a dissenting opinion by Judge Perlman.

c. During oral presentation of the case of *Doubleday* to this Court, 17 LW 3119, while speaking of a book which in our view "contains" obscenity and pornography in lesser volume that those passages found in THE DEVIL RIDES OUTSIDE, counsel for the State of New York merely said:

> "The statute on which the judgment rests is valid. A reading of the book by this Court will demonstrate that the finding of obscenity is reasonable. I therefore submit that the judgment below should be affirmed."

We would close with this thought: the book now under scrutiny is, we respectfully submit, dominantly porno-

graphic as tested by the Hicklin Rule or the modern doctrine. This is not a borderline case. The day may come when a book will be condemned by some Michigan court because it contains a paragraph or two of obscene import. Here, however, the entire volume is permeated with obscenity.

d. As stated in our summary, while the court below may have taken into account certain passages from the book, there is little doubt that he also considered the volume as a whole with such excerpts restored to context. When Exhibit 2 was first offered in evidence by the State, the trial judge did not admit it in order that excerpts might be stripped from context and considered as obscene passages (R. 23). He took the position that although he had not read the complete book, he intended to do so. Whether he based decision on the complete book afterwards or the excerpts contained therein, would be a matter for his opinion. So, without passing upon the question then, he admitted the excerpts in evidence

> "merely to facilitate the questioning, identification, rather than having the book . . . marked and . . . remarked. . . . In other words, to expedite the . . . trial."

At the close of the trial, in his opinion from the bench (R. 230-232), the court below closed with the following words:

> "I am holding that the defendant is guilty because he sold a book in the city of Detroit containing this language, and also because the court feels that even viewing the book as a whole, it was not necessary to the proper development of the theme of the book nor of the conflict expressed therein."

e. Finally, it might be added, if this Court should find that the trial judge erred in failing to apply the rule in *Ulysses*, and that he did not consider and appraise the book as a whole, this would not necessarily mean that the statute itself is unconstitutional, for the error, if so found, could be corrected in a new trial.

IX

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the recorder's court of the City of Detroit should be affirmed and the Michigan statute presently involved be sustained as against the constitutional objections urged.

Respectfully Submitted,

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General

Daniel J. O'Hara
Assistant Attorney General